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MAY 10 2005

RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

12 ALFREDO BARAJAS; MARCO HERNANDEZ,  
*Plaintiffs,*

13 v.

14 OFFICER HERNANDEZ, BADGE NO. 2538,  
 individually and in his capacity as a San Jose police  
 15 officer; OFFICER ESTRADA, BADGE NO.  
 1978, individually and in his capacity as a San Jose  
 16 police officer; JOHN DOE and RICHARD ROE,  
 individually and in their capacities as police officers  
 17 for the City of San Jose, the identity and number of  
 whom are unknown to plaintiff; THOMAS  
 18 WHEATLEY, individually and in his capacity as  
 acting chief of police for the City of San Jose;  
 19 CITY OF SAN JOSE; LA CUMBRE  
 ENTERPRISES, INC. D.B.A. CLUB CARIBE;  
 20 DOES 1 through 50,

*Defendants.*

C05 01934

No.

HRL

COMPLAINT FOR VIOLATION  
 OF CIVIL RIGHTS --  
 JURY TRIAL DEMANDED

JURISDICTION

1. This action arises under Title 42 of the United States Code, Section 1983. Jurisdiction  
 is conferred upon this Court by Title 28 of the United States Code, Sections 1331 and 1343. The

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1 unlawful acts and practices alleged occurred in the City of San Jose, which is within this judicial  
2 district.

3  
4 **PARTIES**

5  
6 2. Plaintiffs ALFREDO BARAJAS and MARCO HERNANDEZ are and at all times herein  
7 mentioned were, residents of San Jose, California, and readily recognizable as Hispanic.

8  
9 3. Defendant CITY OF SAN JOSE ("CITY") is a municipal corporation, duly organized  
10 and existing under the laws of the State of California. Defendant THOMAS WHEATLEY  
11 (hereinafter "WHEATLEY") at all time mentioned herein was the Interim Chief of Police for CITY,  
12 acting under the color of law and in the course and scope of his employment for defendant CITY.

13  
14 4. At all times mentioned herein, defendants OFFICER HERNANDEZ, BADGE NO.  
15 2538, ESTRADA, BADGE NO. 1978, JOHN DOE and RICHARD ROE (hereinafter  
16 "OFFICERS"), were employed as police officers for defendant CITY. Defendant officers are sued  
17 individually and in their capacity as police officers for the CITY. By engaging in the conduct  
18 described here, defendant officers acted under the color of law and in the course and scope of their  
19 employment for defendant CITY. By engaging in the conduct described here, defendant officers  
20 exceeded the authority vested in them as police officers under the United States Constitution and  
21 as employees of the CITY.

22  
23 5. Defendant LA CUMBRE ENTERPRISES, INC. (Hereinafter "CLUB CARIBE") is, and  
24 at all times mentioned herein was, a corporation duly organized under the laws of the State of  
25 California, doing business as Club Caribe, with its principal place of business located in San Jose,  
26 California. CLUB CARIBE regularly hired San Jose police officers to act as security for its club, and  
27

1 said officers would patrol outside the club in full uniform and exercise the full powers of San Jose  
2 police officers while being paid by CLUB CARIBE. As such, CITY and CLUB CARIBE acted as  
3 joint venturers, and the actions of CLUB CARIBE and its employees were therefore done under of  
4 color of law.

5  
6 6. Plaintiffs are ignorant of the true names and capacities of defendant DOES 1 through 50,  
7 inclusive, and therefore sue these defendants by such fictitious names. Plaintiffs are informed and  
8 believe and thereon allege that each defendant so named is responsible in some manner for the  
9 injuries and damages suffered by plaintiffs as set forth. Plaintiffs will amend their complaint to state  
10 the true names and capacities of defendants DOES 1 through 25, inclusive, when they have been  
11 ascertained.

12  
13 7. At all times mentioned herein, each named and DOE defendant was the agent or  
14 employee of co-defendant CITY and/or CLUB CARIBE, and in doing the things alleged, were  
15 acting within the course and scope of such agency or employment and with the actual or implied  
16 permission, consent, authorization, and approval of CITY and/or CLUB CARIBE.

### 17 18 19 STATEMENT OF FACTS

20  
21 8. The City of San Jose and its police department have a policy allowing its police officers  
22 to work for private individuals and businesses while in uniform, and these are called "pay jobs". As  
23 a result of this practice, San Jose police officers perform police functions while being paid directly  
24 by private employers, and thus develop split loyalties between their official employer and the private  
25 employer.

1 9. Although the city benefits by not having to pay its officers, the public is put at risk because  
2 these police officers develop a higher loyalty to their patrons than to their constitutional obligations,  
3 and individual members of the public are often severely injured by unchecked brutality at these sites,  
4 as well as having their constitutional rights infringed.

5  
6 10. A typical "pay job" is to work as a de facto bouncer at bars and nightclubs, and one such  
7 pay job, and perhaps the most notorious, is at the Club Caribe, located at the corner of South First  
8 and Willow Streets, in San Jose. This club is owned and operated by defendant CLUB CARIBE.

9  
10 11. Defendants OFFICER HERNANDEZ, BADGE NO. 2538, and OFFICER  
11 ESTRADA, BADGE NO. 1978, frequently work at CLUB CARIBE.

12  
13 12. A typical infringement of constitutional rights occurring directly a result f the CITY's  
14 policy is to arrest innocent persons and charge them with violation of Penal Code section 647,  
15 subdivision (f), so-called drunk in public, and for the OFFICERS to write down that the suspect was  
16 so intoxicated that he or she could not care for himself or herself, and describe as though written with  
17 a rubber stamp that the suspect had a strong odor of an alcoholic beverage, had bloodshot and  
18 watery eyes, and slurred speech. Oftentimes the police officers engage in the use of unnecessary and  
19 excessive force while engaged in the "pay job". Upon arrest, the suspect is then transported to a  
20 detention facility and held for several hours with no chemical test being administered, and then,  
21 when released, is totally unable to substantiate his or her actual sobriety. Literally hundreds of  
22 citizens per year are forced to enter guilty or no-contest pleas rather than face a trial in which it is  
23 their dilemma to have to pay thousands of dollars for defense and in which they will be opposed by  
24 professional witnesses and in which they have no evidence other than their own testimony to prove  
25 their innocence. The CITY and WHEATLEY were very aware of this scenario, and ratified it  
26  
27

1 through official policies and procedures despite knowing the risks and actual consequences to the  
2 public.

3  
4 13. Plaintiffs are both residents of the City of San Jose and are clearly recognizable as  
5 Hispanic.

6  
7 14. On 27 December 2003, plaintiffs went to CLUB CARIBE with family members.  
8 Neither was intoxicated. CLUB CARIBE's bouncers did not like the fact that Marco Hernandez'  
9 shirt was not tucked in, and proceeded to lay hands on him and literally throw him into the street.

10  
11 15. When Mr. Hernandez landed, he was met by OFFICER HERNANDEZ and  
12 OFFICER ESTRADA who, after being instructed by CLUB CARIBE's bouncers to arrest Mr.  
13 Hernandez, proceeded to severely beat Mr. Hernandez about his entire body with their fists, feet,  
14 and weapons, severely injuring him about his entire body. Both OFFICER HERNANDEZ and  
15 OFFICER ESTRADA were in full San Jose police uniforms, but plaintiffs are informed and believe  
16 that they were being paid by CLUB CARIBE.

17  
18 16. Mr. Hernandez suffered cuts, abrasions, and bruises to his head, neck, shoulders, arms,  
19 back, torso, and legs, as well as serious injury to his back as a result of the actions by the bouncers  
20 and OFFICERS.

21  
22 17. Mr. Barajas came outside to protect Mr. Hernandez, and began yelling at the  
23 OFFICERS. As a result, the OFFICERS laid hands on Mr. Barajas about his entire body, causing  
24 injury to his body and extremities due to the manhandling he received during the arrest, including  
25 his wrists from being handcuffed too tightly, and put him under arrest for being drunk in public, not  
26 because he was, but because they could.

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1 18. Both plaintiffs were transported to jail by other OFFICERS, and both were charged with  
2 drunk in public. Mr. Barajas' charges were dismissed because it was clear to all involved that he  
3 never did anything other than come out and speak to the OFFICERS. Mr. Hernandez, unable to  
4 mount a vigorous defense because of his financial condition, was forced to plead no contest to the  
5 charge.

### 6 7 8 **DAMAGES** 9

10 19. As a proximate result of defendants' conduct, plaintiffs suffered pain and physical  
11 injuries. As a further proximate result of defendants' conduct, plaintiffs suffered severe emotional  
12 and mental distress, fear, terror, anxiety, humiliation, embarrassment, and loss of their sense of  
13 security, dignity, and pride as citizens of the United States.

14  
15 20. As a further proximate result of defendants' conduct, plaintiffs have incurred expenses,  
16 including medical expenses, and lost time from their usual occupations.

17  
18 21. The conduct of defendants OFFICERS and CLUB CARIBE was malicious, wanton,  
19 and oppressive. Plaintiffs are therefore entitled to an award of punitive damages against defendants  
20 OFFICERS and CLUB CARIBE.

21  
22 22. Plaintiffs found it necessary to engage the services of private counsel to vindicate their  
23 rights under the law. Plaintiffs are therefore entitled to an award of all attorney's fees incurred in  
24 relation to this action for violation of their civil rights.

25 //

26 //

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**FIRST CLAIM FOR RELIEF**

(42 U.S.C § 1983)

(Against defendants OFFICERS and DOES 1 through 50, inclusive)

23. Plaintiffs reallege and incorporate by reference paragraphs 1 through 22 of this complaint.

24. In doing the acts complained of, defendants OFFICERS acted under color of law to deprive the plaintiff of certain constitutionally protected rights, including, but not limited to:

a. The right to be free from unreasonable searches and seizures, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution;

b. The right to be free from arrest without probable cause, as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution;

c. The right not to be deprived of life or liberty without due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution;

d. The right to be free from the use of excessive force by police officers and other government actors, which is guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution;

e. The right to be free from cruel and unusual punishment; and from pre-charging and pre-judgment punishments, as guaranteed by the Eighth Amendment to the United States Constitution;

f. The right to be free from interferences with the zone of privacy, as protected by the Fourth and Ninth Amendments to the United States Constitution;

g. The right to preservation of evidence in a criminal case, as protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and,

h. The right to prompt medical attention as guaranteed by the Fourteenth Amendment to the United States Constitution.

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1 25. As a proximate result of defendants' wrongful conduct, plaintiffs suffered injuries and  
2 damages as set forth.

3  
4 **WHEREFORE**, Plaintiffs pray for relief as set forth.

5  
6  
7 **SECOND CLAIM FOR RELIEF**

(42 U.S.C. § 1983)

8 (Against Defendants CITY OF SAN JOSE and WHEATLEY)

9  
10 26. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 25 of this  
11 complaint.

12  
13 27. The CITY and WHEATLEY, Interim Chief of Police for the CITY, by and through  
14 their supervisory officials and employees, have been given notice on repeated occasions of a pattern  
15 of ongoing constitutional violations and practices by defendants CITY, CLUB CARIBE, and  
16 OFFICERS herein, and other San Jose police officers, as outlined in paragraphs 8 through 19 of this  
17 complaint. Despite said notice, defendants CITY and WHEATLEY have demonstrated deliberate  
18 indifference to this pattern and practices of constitutional violations by failing to take necessary,  
19 appropriate, or adequate measures to prevent the continued perpetuation of said pattern of conduct  
20 by San Jose police officers and CLUB CARIBE. This lack of an adequate supervisorial response by  
21 defendants CITY and WHEATLEY demonstrates the existence of an informal custom or policy  
22 which tolerates and promotes the continued use of excessive force against and violation of civil rights  
23 of citizens by San Jose police officers.

24  
25 28. The acts of defendant police officers alleged herein are the direct and proximate result  
26 of the deliberate indifference of defendants CITY, WHEATLEY, and their supervisory officials and  
27

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employees to violations of the constitutional rights of persons by defendant police officers herein, and other members of the San José Police Department. The plaintiffs' injuries were foreseeable and a proximate result of the deliberate indifference of the CITY and WHEATLEY to the pattern, practices, customs, and policies described above.

**WHEREFORE**, Plaintiffs pray for relief as set forth.

**THIRD CLAIM FOR RELIEF**  
(42 U.S.C. § 1983)  
(Against Defendant CLUB CARIBE)

29. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 28 of this complaint.

30. Defendant CLUB CARIBE undertook to perform a traditionally public function by entering into an agreement with the CITY to use San Jose police officers act as security guards in full uniform and power to exercise governmental authority but while being paid by CLUB CARIBE. Because of this, CLUB CARIBE was acting in a joint venture with the CITY.

31. CLUB CARIBE, by and through its supervisory officials and employees, has been given notice on repeated occasions of a pattern of ongoing constitutional violations and practices by defendant police officers herein and other San Jose police officers, consisting of false arrests, failure to adequately investigate, illegal searches and seizures, and excessive use of force. Despite said notice, defendant CLUB CARIBE has demonstrated deliberate indifference to this pattern and practices of constitutional violations by failing to take necessary, appropriate, or adequate measures to prevent the continued perpetuation of said pattern of conduct by San Jose police officers. The

1 undertaking of the traditional government function and its grossly inadequate performance by  
 2 defendant CLUB CARIBE demonstrates the existence of an informal custom or policy which  
 3 tolerates and promotes the continued violation of civil rights of citizens by San Jose police officers  
 4 in the employ of CLUB CARIBE.

5  
 6 32. The acts of defendant police officers alleged herein are the direct and proximate result  
 7 of the deliberate indifference of defendant CLUB CARIBE and its supervisory officials and  
 8 employees to violations of the constitutional rights of persons by defendant police officers herein, and  
 9 other members of the San Jose Police Department. The plaintiffs' injuries were foreseeable and a  
 10 proximate result of the deliberate indifference of CLUB CARIBE to the pattern, practices, customs,  
 11 and policies described above.

12  
 13 **WHEREFORE**, Plaintiffs pray for relief as set forth.

14  
 15  
 16 **FOURTH CLAIM FOR RELIEF**

17 (Assault and Battery)  
 18 (Against all defendants)

19  
 20 33. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 32 of this  
 21 complaint.

22  
 23 34. Defendant OFFICERS and employees of CLUB CARIBE committed assault and  
 24 battery against plaintiffs by beating Marco Hernandez and laying hands on Alfredo Barajas even  
 25 though they knew that plaintiffs had committed no crime.

26  
 27 35. Defendants' conduct was neither privileged nor justified under statute or common law.

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36. As a proximate result of defendants' wrongful conduct, plaintiffs suffered damages as set forth.

**WHEREFORE**, Plaintiffs pray for relief as set forth.

**FIFTH CLAIM FOR RELIEF**  
(Intentional Infliction of Emotional Distress)  
(Against all defendants)

37. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 36 of this complaint.

38. The conduct of defendant OFFICERS and/or employees of CLUB CARIBE, as set forth herein, was extreme and outrageous and beyond the scope of conduct which should be tolerated by citizens in a democratic and civilized society. However, in order to deliberately injure plaintiffs, defendant OFFICERS and/or employees of CLUB CARIBE committed the aforementioned extreme and outrageous acts with the intent to inflict severe mental and emotional distress upon plaintiffs.

39. As a proximate result of defendants' willful, intentional and malicious conduct, plaintiffs suffered severe and extreme mental and emotional distress. Therefore, plaintiffs are entitled to an award of punitive damages as against the individually named police officers as well as the employees of CLUB CARIBE and CLUB CARIBE itself. Plaintiffs have suffered damages as set forth.

**WHEREFORE**, Plaintiffs pray for relief as set forth

**SIXTH CLAIM FOR RELIEF**

(Negligence)  
(Against all defendants)

40. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 39 of this complaint, except for any and all allegations of intentional, malicious, extreme, outrageous, wanton, and oppressive conduct by defendants, and any and all allegations requesting punitive damages.

41. At all times herein mentioned, defendants were subject to a duty of care, to avoid causing unnecessary physical harm and distress to citizens in the exercise of the police function as well as operating a nightclub. The conduct of defendants, as set forth herein, did not comply with the standard of care to be exercised by reasonable police officers and club owners, proximately causing plaintiffs to suffer damages as set forth.

**WHEREFORE**, Plaintiffs pray for relief as set forth.

**SEVENTH CLAIM FOR RELIEF**

(Negligent Selection, Training, Retention, Supervision, Investigation, and Discipline)  
(Against Defendant CLUB CARIBE)

42. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 41 of this complaint, except for any and all allegations of intentional, malicious, extreme, outrageous, wanton, and oppressive conduct by defendants, and any and all allegations requesting punitive damages.

43. Defendant CLUB CARIBE has, and at all times mentioned herein had, a mandatory duty of care to properly and adequately select, train, retain, supervise, investigate, and discipline its employees herein so as to avoid unreasonable risk of harm to citizens.

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1 44. Defendant CLUB CARIBE, by and through its supervisory officials and employees, has  
2 been given notice on repeated occasions of a pattern of ongoing violent practices by defendants and  
3 other employees, consisting of the use of unnecessary and excessive force against customers,  
4 especially Hispanic customers

5  
6 45. Despite this notice, defendant CLUB CARIBE demonstrated deliberate indifference to  
7 this pattern and practice of needless violence by failing to take necessary, appropriate or adequate  
8 measures to prevent the continued perpetuation of this pattern of conduct by its employees.

9  
10 46. Defendant CLUB CARIBE breached its duty of care to citizens in that they have failed  
11 to adequately train defendant employees, and other employees, in the proper use of force and  
12 identification procedures in the course of their employment. This lack of an adequate supervisory  
13 response by defendant CLUB CARIBE, and lack of adequate supervisory training, demonstrates  
14 the existence of an informal custom or policy which tolerates and promotes the continuing use of  
15 excessive force against and violation of civil rights of Hispanic citizens by its employees.

16  
17 47. As a proximate result of defendants' wrongful conduct, plaintiff suffered damages as set  
18 forth.

19  
20 **WHEREFORE**, Plaintiffs pray for relief as set forth.

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22 //

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**EIGHTH CLAIM FOR RELIEF**  
 (Negligent Infliction of Emotional Distress)  
 (Against all defendants)

48. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 47 of this complaint, except for any and all allegation of intentional, malicious, extreme, outrageous, wanton, and oppressive conduct by defendants, and any and all allegations requesting punitive damages.

49. At all times herein mentioned, defendants were subject to a duty of care, to avoid causing unnecessary physical harm and distress to citizens. The conduct of defendants, as set forth herein, did not comply with the standard of care to be exercised by reasonable police officers and club employees, proximately causing plaintiff to suffer damages as set forth.

50. The conduct of defendant OFFICERS and employees of CLUB CARIBE as set forth herein, was extreme and outrageous and beyond the scope of conduct which should be tolerated by citizens in a democratic and civilized society.

51. As a proximate result of defendants' conduct, plaintiffs suffered severe and extreme mental and emotional distress. Plaintiffs have suffered damages as set forth.

**WHEREFORE**, Plaintiffs pray for relief as set forth.

**NINTH CLAIM FOR RELIEF**  
 (California Civil Code § 52.1)  
 (Against all defendants)

52. Plaintiffs reallege and incorporate by reference herein paragraphs 1 through 51 of this complaint.

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53. The conduct of defendant OFFICERS and employees of CLUB CARIBE as described herein violated California Civil Code § 52.1, in that they interfered with plaintiffs' exercise and enjoyment of their civil rights, as enumerated above, through use of wrongful force and false arrest and imprisonment.

54. As a direct and proximate result of defendants' violation of Civil Code § 52.1 plaintiffs suffered violations of their constitutional rights, and suffered damages as set forth.

55. Since the conduct of defendant officers and club employees occurred in the course and scope of their employment, defendants CITY and CLUB CARIBE are therefore liable to plaintiffs pursuant to respondeat superior.

56. Plaintiffs are entitled to injunctive relief and an award of reasonable attorney's fees pursuant to Civil Code § 52.1.

**WHEREFORE**, Plaintiff prays for relief as set forth.

**TENTH CLAIM FOR RELIEF**  
(False Imprisonment)  
(By plaintiff BARAJAS as against all defendants)

57. Plaintiff Alfredo Barajas realleges and incorporates by reference herein paragraphs 1 through 56 of this complaint.

58. On or about 27 December 2003, defendant OFFICERS and employees of CLUB CARIBE detained and eventually arrested plaintiff Barajas maliciously and without a warrant or



1 order of commitment of any kind, or any other legal authority of any kind, even though plaintiff had  
2 not committed any crime or public offense. Defendant OFFICERS and employees of CLUB  
3 CARIBE did not have reasonable cause to believe that plaintiff Barajas had committed any offense.  
4

5 59. Defendant OFFICERS transported plaintiff Barajas to Santa Clara County Main Jail  
6 where plaintiff was imprisoned until his eventual release.  
7

8 60. The conduct of defendant OFFICERS and employees of CLUB CARIBE, as set forth  
9 herein, was extreme and outrageous and beyond the scope of conduct which should be tolerated by  
10 citizens in a democratic and civilized society. However, in order to deliberately injure plaintiff  
11 Barajas, defendant OFFICERS and employees of CLUB CARIBE committed the aforementioned  
12 extreme and outrageous acts with the intent to inflict severe injury upon plaintiff, thereby justifying  
13 an award of punitive damages against all defendants.  
14

15 61. As a proximate result, plaintiff suffered damages as set forth.  
16

17 **WHEREFORE**, Plaintiff prays for damages as set forth.  
18  
19

### 20 **CLAIM REQUIREMENT**

21

22 62. For state causes of action related to Federal claims, plaintiffs are required to comply with  
23 an administrative claim requirement under California Law. Plaintiffs have complied with all  
24 applicable requirements.  
25  
26  
27

**JURY DEMAND**

63. Plaintiffs hereby demand a jury trial in this action.

**PRAYER**

WHEREFORE, Plaintiff prays for relief as follows:

1. General damages according to proof;
2. Special damages according to proof;
3. Punitive damages according to proof;
4. Reasonable attorney's fees pursuant to 42 U.S.C. §1988
5. For injunctive relief enjoining defendant CITY from authorizing, allowing, or ratifying the practice by any CITY employee, including all members of the San Jose Police Department, of allowing private clubs from paying San Jose police officers for performing their duties while in full uniform, of false arrest for substance offenses as pretext for unlawful searches or harassment of citizens, and for excessive force used as punishment for persons invoking their constitutional rights;
6. Reasonable attorney's fees pursuant to California Civil Code section 52.1, subdivision (h);

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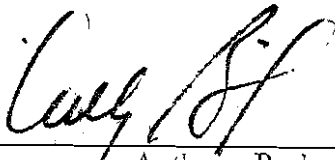
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1 7. Costs of suit incurred herein; and,

2 8. Such other and further relief as the Court may deem just and proper.

3  
4  
5 Dated: 9 May 2005

6  
7 LAW OFFICES OF ANTHONY BOSKOVICH

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11 By:   
12 Anthony Boskovich  
13 Attorney for Plaintiffs  
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